Supreme Court, U.S.
FILED

95 1489 DEC 26 1995

OFFICE OF THE CLERK

Docket No.

In The

Supreme Court of the United States

October Term, 1995

MARK DEAN GODDARD,
Petitioner,

vs.

KANSAS DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX,
Respondent.

APPENDIX

JOHN P. GERSTLE II-KS #07793
Counsel of Record
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35 pp

SUPREME COURT ORDER DISTRICT CASE NO.

IN THE SUPREME COURT
OF THE STATE OF KANSAS

RICHARD W PARKER
7600 W 110TH ST SUITE 104
OVERLAND PARK KS 66210-2392

IN THE MATTER OF THE APPEAL OF MARK DEAN GODDARD FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF NO. 95-73903-AS MARIJUANA AND CONTROLLED SUBSTANCES TAX AND IN THE MATTER OF TEE APPEAL OF ROBERT LEE FOSTER FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND COANTROLLED SUBSTANCES TAX

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY APPELLANTS, MARK DEAN GODDARD AND ROBERT LEE FOSTER.
DENIED.
RESPONSE NOTED.

BOTA DOCKET NOS. 92-16575-DT AND 92-16576-DT

DATE:09/26/95. CAROL G. GREEN CLERK

COURT OF APPEALS ORDER DISTRICT CASE NO.

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

RICHARD W PARKER
7600 W 110TH ST SUITE 104
OVERLAND PARK KS 66210-2392

IN THE MATTER OF THE APPEAL OF MARK DEAN GODDARD FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF

NO. 95-73903-A

MARIJUANA AND CONTROLLED SUBSTANCES TAX AND IN THE MATTER OF THE APPEAL OF ROBERT LEE FOSTER FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND COANTROLLED SUBSTANCES TAX

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:
MOTION BY APPELLANT, MARK DEAN GODDARD AND ROBERT LEE FOSTER FOR REHEARING AND MODIFICATION. DENIED. RESPONSE NOTED.
BOTA DOCKET NOS. 92-16575-DT AND 92-16576-DT

DATE: 08/14/95. CAROL G. GREEN CLERK

No. 95-73,903

IN THE COURT OF APPEALS OF
THE STATE OF KANSAS

In the Matter of the Appeal of
Mark Dean Goddard, et al.

ORDER

In the absence of a response to this court's order dated June 25. 1995, the appeal is hereby dismissed for appellants' failure to timely file a bond. See Kansas Supreme Court Rule 9.03(b).

DATED: July 24,1995.

FOR THE COURT

/s/

EDWARD LARSON, Judge

COURT OF APPEALS ORDER DISTRICT CASE NO.

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

RICHARD W PARKER
7600 W 110Th ST SUITE 104
OVERLAND PARK KS 66210-2392

IN THE MATTER OF TEE APPEAL OF MARK DEAN GODDARD FROM AN ORDER OF TEE DIRECTOR OF TAXATION ON ASSESSMENT OF

NO. 95-73903-A

MARIJUANA AND CONTROLLED SUBSTANCES TAX
AND
IN THE MATTER OF THE APPEAL OF ROBERT LEE FOSTER FROM AN ORDER OF TEE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND COANTROLLED SUBSTANCES TAX

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

RESPONSES TO COURT ORDER. MOTION TO WAIVE BOND DENIED. APPELLANT'S HAVE 10 DAYS TO FILE THE REQUIRED BOND.

BOTA DOCKET NOS. 92-16575-DT AND 92-16576-DT

DATE: 06/26/95. CAROL G. GREEN CLERK

No. 95-73,903

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

In the Matter of The Appeal of
Mark Dean Goddard, et at

ORDER

Appellants' motion to waive bond is denied on present showing. The parties are ordered to address the issue of an appropriate bond by written responses to be served and filed on or before May 22, 1995. Appellants' failure to respond will result in dismissal of the appeal without further notice.

DATED: May 5,1995.

FOR THE COURT

/s/

J.P. BRAZIL, Judge

BEFORE THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF MARK DEAN GODDARD, FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX.

Docket No. 92-16575-DT

AND

IN THE MATTER OF THE APPEAL OF ROBERT LEE FOSTER, FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX.

Docket No. 92-16576-DT

CORRECTIVE ORDER DENYING RECONSIDERATION

Now, on this 6th day of March, 1995, the above-captioned matters come on for consideration and decision by the Board of Tax Appeals of the State of Kansas.

The Board finds that the Taxpayer has timely filed a Petition for Reconsideration with the Board pursuant to K.S.A. § 77-529 (a). The facts surrounding service of the Taxpayer require explanation. The Taxpayers' attorney filed a Notice of Appeal with the Board on October 12, 1992. At that time, the attorney's address was Suite 120, 10901 Lowell, Overland Park, Kansas 66210. On January 18, 1994, the attorney filed a Notice of Change of Address with the Board. The new (and current) address is Suite 104, 7600 West 110th Street, Overland Park, Kansas 66210-2392.

The hearing in these matters was held on June 1, 1994, and the order was certified and sent out on January 30, 1995. The Board sent copies of the Order to the Taxpayers' attorney and the Department's attorney on that date. However, the Board sent the Order to the Taxpayers' attorney at his old Lowell address.

On or before February 24, 1995, the Taxpayer's attorney had a copy of the January 30th Order.

The Taxpayers' attorney then requested reconsideration and submitted evidence that the Order was sent on January 30, 1993 to the old Lowell address.

The Board finds that a clerical error was made in the service of the January 30th Order. In the Kansas Administrative Procedures Act, it states that service is presumed where there is a written certificate on the Order, as was there was in this case. K.S.A. § 77-531. However, the Taxpayer has presented enough evidence to overcome this presumption. The evidence shows that service was complete, not on

January 30, 1995, but on February 24, 1995, when the Taxpayers attorney actually received the Order.

In the Taxpayer's Petition for Reconsideration, the Taxpayers' attorney brings up several issues for the Board's consideration. The Board finds that most of these are without merit and do not warrant any further consideration. However, one issue brought up by the Taxpayers attorney states that the Board's Order is in error wherein it states that in ¶ 8A that, "A. [t]he Taxpayers were convicted of possession of cocaine That particular sentence fragment should be corrected to read as follows: "A. The Taxpayers were convicted of the sale of cocaine

Inasmuch, as the Taxpayer did not plead guilty to the possession of marijuana, the Board cannot state that the Taxpayers admitted to possessing the marijuana. However, the Department found that the Taxpayers were in possession of the cocaine, as well as some marijuana found at their residence. In this case, the criminal conviction is not dispositive of the issue of whether or not the Taxpayers were in possession of the cocaine that was taxed. The burden of proof is greater to sustain a criminal conviction than a tax assessment.

The Taxpayer has the burden to overturn the assessment which is presumed to be valid and correctly determined. K.S.A. §79-5205 (c). The evidence presented on behalf of the Taxpayers does not overcome

this presumption. Other than the criminal conviction for other charges, no evidence is presented.

Therefore, the Board finds that upon review of the Taxpayers' Petition for Reconsideration, that no new or additional evidence is offered that would persuade the Board that the original order should be modified, save for the one correction made herein.

IT IS, THEREFORE, BY THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS, CONSIDERED AND ORDERED that, the above-captioned Petition for Reconsideration should be, and the same is hereby, denied. IT IS ALSO ORDERED that ¶ 8A shall be corrected to read as follows: "A. The Taxpayers were convicted of the sale of cocaine...."IT IS FURTHER ORDERED that the Order dated January 30, 1995, entered herein shall be sustained in all other respects.

IT IS SO ORDERED THE BOARD OF TAX APPEALS

/seal/

/s/
Jack Shriver, Chairman

/s/
Rita Maichel, Secretary

/s/
Myra B. Gross, Member

/s/
Carl Edwards, Attorney

/s/
Fred J. Hirsch, Member

/s/
Lawrence L. Tenopir, Member

/s/
Perl M. Bass, Member

CERTIFICATION

I, Rita Maichel, Secretary of the Board of Tax Appeals of the State of Kansas, do hereby certify that a true and correct copy of the order in Docket Nos. 92-16575-DT and 92-16576-DT was placed in the United States Mail, on this 6th day of March, 1995 addressed to:

Richard W Parker, Attorney at Law
7600 W 110th Street
Suite 104
Overland Park, KS 66210-2392;

and a copy was placed in capitol complex building mail, addressed to:

Director of Taxation
915 S.W. Harrison, 3rd Fl
Topeka, KS 66612

Brian Cox, Attorney ,
c/o General Counsel
Department of Revenue
DSOB, 915 S.W. Harrison, 2nd
Topeka, KS 66612

IN TESTIMONY WHEREOF, I have hereunto subscribed my name at Topeka, Kansas.

/s/

Rita Maichel, Secretary

BEFORE THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF MARK DEAN GODDARD, FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX.

Docket No. 92-16575-DT

and

IN THE MATTER OF THE APPEAL OF ROBERT LEE FOSTER FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX.

Docket No. 92-16576-DT

ORDER

Now, on this 30th day of January, 1995, the above-captioned matters come on for consideration and decision by the Board of Tax Appeals of the State of Kansas.

After considering all of the evidence presented

therein, and being fully advised in the premises, the Board finds as follows:

1. The Board has jurisdiction of the subject matters, the parties, proper and timely appeals having been filed, pursuant to K.S.A. §74-2435.
2. The subject of these applications are appeals from assessments of Marijuana and Controlled Substances Tax imposed by the Director of Taxation pursuant to K.S.A. §79-5201 et seq.

3. Before considering these matters fully, the Board motes immediately that K.S.A. § 79-5205 (c) (1991 Supp.) states: "The tax, penalties and interest assessed by the director of taxation are presumed to be valid and correctly determined and assessed. The burden is on the taxpayer to show their incorrectness or invalidity...."

   By law, the burden is upon the Taxpayers to show that the assessments at issue are invalid or incorrect.

4. A tax is imposed upon marijuana and controlled substances in the possession of a dealer. K.S.A. § 79-5202. A "Dealer" is

defined, for tax purposes, as a person who illegally manufactures, produces, ships, transports, imports, acquires or possesses in any manner:

(a) 28 or more grams of marijuana,
(b) one or more grams of any con trolled substance, or
(c) ten or more dosage units of con trolled substance not sold by weight.

K.S.A. § 79-5201(c)

5. The assessment at issue was based on possession of 63.3 grams of marijuana at $3.50 per gram (or approximately $100.00 per ounce), or portion thereof; and 2,859.2 grams of cocaine, a controlled substance, at $200.00 per gram, or portion thereof; and a 100% penalty for the absence of a stamp or other indicia indicating that the tax had been paid. The total assessment amounted to $1,144,460.00. Both Mr. Foster and Mr. Goddard are jointly and severally liable for the tax.

6. The Taxpayers' Attorney contends that the U.S. Supreme Court's decision in Department of Revenue of Montana v. Kurth Ranch, et al., 1994 WL 237615 (U.S.) should be followed. In Kurth Ranch, the Defendant/Taxpayer, in an effort to save the family ranch, embarked

on a scheme to grow marijuana. Eventually, the law caught up with the Kurth family, and they were assessed a tax pursuant to the State of Montana's Dangerous Drug Tax. The Kurths were taxed $181,000 on 1,811 ounces of harvested marijuana—approximately $100.00 per ounce.

Ultimately, the United States Supreme Court struck down Montana's Dangerous Drug Tax on the grounds that it was a punitive "tax." The assessment was so excessive that it could not be classified as remedial. See also U.S. V. Maiper, 490 U.S. 435 (1989). The Court stated that the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction. Kurth Ranch at 1994 WL 237615, *6 (U.S.).

7. The Board has determined that the Kurth Ranch decision is not applicable to the case at bar. The Board has no authority to rule on constitutional issues. Were the Board to follow Kurth Ranch, it would have to find that Article 52, of Chapter 79 of the Kansas Statutes Annotated is unconstitutional. The Board is specifically prohibited from ruling on constitutional issues. "It is the [Board]'s duty to presume that the statutes are constitutional and valid." Feiten Truck Line v. State Board of Tax Appeals, 183 Kan 287, 293, 327 P.2d 836 (1958).

In fact, the Kansas Supreme Court has held that Article 52, of Chapter 79 of the Kansas Statutes Annotated is constitutional. State V. Durrant, 244 Kan. 522, 526, 769 P.2d 1174 (1989). See also State v. Berberich, 248 Kan. 854, 862, 868, 811 P.2d 1192 (1991). The Board finds that it is bound by the decisions of the Kansas Supreme Court in this matter. The Kansas judiciary will have to consider the Taxpayer's request to apply Kurth Ranch. See In re Residency Application of Bybee, 236 Kan. 443, 449, 691 P.2d 37 (1984)

8. The facts which have been stipulated to are as follows:
A. The Taxpayers were convicted of possession of cocaine; and,

B. the Taxpayers were convicted of attempted possession of cocaine.

9. As stated above, the law requires a tax on the marijuana or cocaine in the illegal possession of a dealer. For purposes of this statute, "dealer" is defined as one who has possession of the drugs.

10. The Taxpayers knowingly and voluntarily admitted to possessing certain amounts of cocaine, and therefore, they knowingly and voluntarily admitted to owing the appropri-

ate tax on those amount if illicit substances. No facts are presented to indicate otherwise. Therefore, the Board finds that the Department's assessment should stand.

IT IS, THEREFORE, BY THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS, CONSIDERED AND ORDERED that the Taxpayers' appeals should be and are hereby, denied.

If any party to this appeal feels aggrieved by this decision, they may file a written petition for reconsideration with this Board. The written petition for reconsideration shall set forth specifically and in adequate detail the particular and specific respects in which it is alleged that the Board's order is unlawful, unreasonable, capricious, improper or unfair. A copy of the petition, together with all documents submitted therewith, shall be nailed to the opposing party at the same time the petition is mailed to the Board. Failure to notify the opposing party shall render any subsequent order voidable. The written petition must be received by the Board within fifteen (15) days of the certification date of this order (allowing an additional three days for mailing pursuant to statute if the Board serves the order by mail). If at 5:00 pm on the last day of the specified period the Board has not received a written petition for reconsideration, this order will become a final order from which no further appeal is available.

IT IS SO ORDERED THE BOARD OF TAX APPEALS

/seal/

/s/
Jack Shriver, Chairman

/s/
Rita Maichel, Secretary

/s/
Myra B. Gross, Member

/s/
Carl Edwards, Attorney

/s/
Fred J. Hirsch, Member

/s/
Lawrence L. Tenopir, Member

/s/
Perl M. Bass, Member

CERTIFICATION

I, Rita Maichel, Secretary of the Board of Tax Appeals of the State of Kansas, do hereby certify that a true and correct copy of the order in Docket Nos. 92-16575-DT and 92-16576-DT and any attachments thereto, were placed in the United States Mail, on this 30th day of January, 1995, addressed to:

Richard W Parker, Attorney at Law
7600 W 110th Street Suite 104
Overland Park, KS 66210-2392

and a copy was placed in capitol complex building mail, addressed to:

Director of Taxation
DSOB, 915 S.W. Harrison, 3rd Fl
Topeka, KS 66612

General Counsel, Dept of Revenue
DSOB, 915 S.W. Harrison, 2nd Fl
Topeka, KS 66612

IN TESTIMONY WHEREOF, I have hereunto subscribed my name at Topeka, Kansas.

/s/

Rita Maichel, Secretary

BEFORE THE DIRECTOR OF TAXATION OF THE
KANSAS DEPARTMENT OF REVENUE

IN THE MATTER OF THE APPEAL OF	)	
ROBERT L. FOSTER	)	
FROM AN ASSESSMENT FOR THE TAXATION OF	)	Reg. No.: 88-0026
MARIJUANA OR CONTROLLED SUBSTANCES	)	Docket No.: 88-304
PURSUANT TO K.S.A. 79-5101 ET SEQ.	)	
DATED JULY 15, 1988	)	

FINAL ORDER

ON THE 15th day of September, 1992, the above captioned matter comes on for consideration before Jim Weisgerber. Designee of the Director of Taxation.

On July 15. 1988. the Department: of Revenue issued an assessment against Taxpayer, pursuant to K.S.A. 79-5201, et seq., for taxes and penalty on marijuana and controlled substances in the amount of $1,144,460.00. On July 25. 1988, Taxpayer perfected his appeal to the Director.

A brief history of the motions made and orders issued in regard to this matter may' be obtained by reference to the Director's Designee's Order of December 10, 1991, captioned Order Regarding Taxpayer's Motion For Summary Judgment Dated November 14. 1991.

A formal hearing was conducted on April 23, 1992. Taxpayer appeared in person, and by his attorney, Richard W. Parker. Kansas Department of Revenue appeared by its attorney, Brian Cox. There were no other appearances.

AFTER BEING FULLY ADVISED IN THE PREMISE, and after carefully considering the evidence and arguments presented herein, the Director's Designee makes the following findings of

fact and conclusions of law:

This case was presented on what might loosely be described as stipulated facts. By' letter dated March 3]. 1992. Taxpayer stipulated that the substance forming the basis of the majority of the Department's assessment was cocaine, and that no drug tax stamps had been affixed to the cocaine. By the same letter, Taxpayer indicated he might at some point be willing to stipulate as to the weight of the cocaine.

At the formal hearing, Taxpayer sought, and was allowed, to admit into evidence: (1) the notice of assessment against Taxpayer dated July 15, 1988, and (2) the Department's form BT/dt-05, "Information to Make Assessment of Tax on Illegal Drugs Pursuant to Chapter 366 of the 1987 Kansas Session Laws", which law enforcement officials completed and returned to the Department to report this matter, and upon

which the Departments assessment was based. Since the second page of the BT/dt-05 was not immediately available, the Department agreed to submit it after the hearing. In addition. Taxpayer asked that the hearing officer take note of the Journal Entry of Taxpayer's criminal conviction on charges of attempted possession of a controlled substance which stemmed from the same situation which gave rise to the drug tax assessment. This request was granted.

Upon submission of documents noted above, and after reserving the right to present various statutory and Constitutional arguments as to the issues of possession and weight. Taxpayer rested his case. The Department of Revenue then moved for the administrative equivalent of summary judgment or a directed verdict on grounds that Taxpayer had failed to overcome the statutory presumption of the correctness and

validity of the Department's assessment by a preponderance of the evidence. After hearing arguments on the Motion, the Motion was taken under advisement. After further discussion. and reserving the right to respond to Taxpayer's legal arguments, the Department: also rested.

Taxpayer came to the hearing with his legal arguments prepared, and submitted them to the hearing officer at that time. The Department of Revenue requested, and was granted, 30 days (until May 22, 1992) to submit its response. Taxpayer was given 10 days to respond to the Department's brief, and reserved the option to request oral a r g u m c n t.

On May 22. 1992, the Department filed a Motion For Extension Of Time To Submit Brief. This Motion was granted over Taxpayer's objection. The Department was given until June 22, 1992, to submit its brief, and Taxpayer was given until July 1, 1992, to respond.

The Department filed its brief on June 23, 1992. Taxpayer responded on June 29, 1992, by filing a Motion To Strike KDR's Response To Taxpayer's "Formal Hearing Brie!"'. In his cover letter, Taxpayer also requested oral argument on the briefs.

At the same time, Taxpayer also filed a Motion to Compel which alleged the Department had not yet submitted the form BT/dt-05, "Information to Make Assessment of Tax on Illegal Drugs Pursuant to Chapter 366 of the 1987 Kansas Session Laws". The Motion sought to compel the Department to submit the document, and requested attorney's fees in the amount of $250 as a consequence of having to pursue the Motion to Compel. The Department s only response was to submit the "Information" form on July 13, 1992, prior to the hearing officer acting on Taxpayer's Motion.

Taxpayer's Motions must be addressed prior to considering the arguments presented. With regard to Taxpayer's Motion To Strike KDR's Response To Taxpayer's "Formal Hearing Brief", the Director's Designee finds the Motion should be granted. Despite an extension of time to file, the Department's brief was filed out of time. As a result of this ruling. the Department's brief will not be considered in deciding this case.

With regard to Taxpayer's Motion to Compel, the Director's Designee finds the Motion should be denied. Filing of the Motion had the desired effect in that it prompted the Department to submitted the document in question. The Department will not be required to pay attorney's fees.

In light of the fact the Department's brief will not be considered in deciding this case, Taxpayer request for oral argument s on the briefs is denied.

Since all motions have been addressed, it is appropriate to consider the argument's raised in Taxpayer's Formal Hearing Brief, and the Department's motion for summary judgment or a directed verdict.

Taxpayer's first argues that the "information" upon which the Department based its notice of assessment and the notice of assessment: itself arc defective. As a basis for this argument. Taxpayer notes both the "information" and the assessment fail to notify him as to when the alleged possession occurred. As a result of this failure, Taxpayer asserts he was denied the opportunity to properly defend himself since he was unable to determine either the factual basis surrounding the assessment, or when the applicable statute of limitations might expire.

Taxpayer's first argument must be rejected for two reasons. First, while it would undoubtedly be a

good idea to do so, nothing in the "Drug Tax Act" requires that either the assessment or the "information" upon which the assessment is based make reference to a date of alleged possession. Second, since the long history of this case clearly indicates Taxpayer has been fully involved in defending this matter since shortly after the assessment was issued, Taxpayer cannot now be heard to say he did not understand the factual situation upon which the Department's assessment was based.

Taxpayer next argues the tax as imposed by the Department is improper in that it results in double taxation. Taxpayer notes that not only he but also one Mark Goddard have been assessed an identical amount of tax arising from the same factual situation. Taxpayer argues that, as a result of this situation, the tax is improper since: (1) double taxation is unconstitutional as a general matter; (2) the controlling statutes do not permit imposing the same tax against multiple dealers; (3) if fully collected from two or more taxpayers the amount of tax collected would exceed the Department's statutory authority to collect; and (4) if the drug tax is allowed to stand the substances in question could be subject to both the drug tax and property tax under K.S.A. 79-101.

Taxpayer's second argument must be rejected for three reasons. First, Taxpayer has failed to demonstrate that the "double taxation" he alleges somehow violates Constitutional requirements. Second, in In the Matter of the Appeal of Thomas D. Bos. etc., Docket No. 89-1357-DT, the Board of Tax Appeals approved the concept of joint and mutual liability for drug tax arising from a joint venture in a case where the Department assessed three taxpayer's for the same amount of tax. Finally, there is no indication the Department of Revenue ever intended to attempt to "expand" the

theory of joint and mutual liability and collect the tax twice by attempting to collect all of the tax from both Taxpayer and Mr. Goddard.

Taxpayer next argues the weight of the controlled substances upon which the tax is assessed is inaccurate. Taxpayer notes the "Information to Make Assessment of Tax on Illegal Drugs Pursuant to Chapter 366 of the 1987 Kansas Session Laws" upon which the Departments assessment was based includes a reference to certain quantities of the drugs being found on the person of another individual or in a storage facility'. Taxpayer argues this information, in and of itself, is sufficient to prove Taxpayer was not in possession of the drugs in question, thereby calling the entire assessment into doubt.

Taxpayer's third argument must be rejected for two reasons. First, since the drug tax may be imposed not only in situations involving actual physical possession, but also in situations involving manufacturing, production, shipment, transporting, importing or acquiring drugs in any other manner, the mere fact that the "Information to Make Assessment of Tax on Illegal Drugs Pursuant to Chapter 366 of the 1987 Kansas Session Laws" upon which the Departments assessment was based did not clearly indicate all the drugs in question were in Taxpayer's physical possession does not mean Taxpayer had not engaged in taxable conduct. Second, in the absence of some proof that the "Information" upon which the Department based its assessment is in error, it cannot be said the entire assessment is inherently flawed.

Taxpayer next argues he did not possess controlled substances. The gist of taxpayer's argument is that in order for the drug tax to attach, there must be a determination that the drugs in question were illegally held or possessed. Taxpayer suggests that only a

criminal conviction for possession will support such determination, and notes that no such conviction is present in this case.

Taxpayer's fourth argument must be rejected for two reasons. First, the drug tax may attach as a result of illegal conduct which is broader than holding or possession. Second, illegal conduct is illegal whether or not the person engaging in the conduct is arrested, prosecuted and/or convicted in a criminal prosecution, or even whether or not the illegal conduct is ever discovered. Taxpayer next argues K.S.A. 79-5201 et seq. is unconstitutional as it is in violation of the Fourteenth Amendment of the United States Constitution in that it denies the Taxpayer equal protection of the laws.

Consideration of Constitutional questions is beyond the scope of these proceedings. In a proceeding before an administrative body such as this tribunal, all of the state statutes are presumed constitutional and valid. Felton Truck Line V. State Board of Tax Appeals. 183 Kan. 287, 293 (1958). This tribunal is without authority to overturn this presumption. As a result, Taxpayer's fifth argument is rejected.

Taxpayer nest argues K.S.A. 79-5201 et seq. is unconstitutional as vague and ambiguous.

As noted above. Constitutional questions arc beyond the scope of these proceedings. As a result, Taxpayer's sixth argument is rejected.

Taxpayer next argues K.S.A. 79-5201 et seq. is unconstitutional as it is in violation of the Fifth Amendment to the United States Constitution.

As noted above, Constitutional questions are beyond the scope of these proceedings. As a result, Taxpayer's seventh argument is rejected.

Taxpayer next argues the Department's assessment is arbitrary and capricious.

Taxpayers eighth argument is rejected as being

unfounded.

Taxpayer next, and finally. argues the assessment of the drug tax is prohibited by double jeopardy. res judicata and collateral estoppel. In regard to the issue of double jeopardy, Taxpayer argues that in order for the drug tax to attach, there must be a determination that the drugs in question were illegally held or possessed which implies some type of criminal conduct. Since Taxpayer would be subject to sanctions for the underlying criminal conduct, the fact that he could also be subject to criminal sanctions for violation of the drug tax act results in double jeopardy, i.e. he could be convicted twice of the same criminal conduct.

In regard to the issues of res judicata and collateral estoppel, Taxpayer argues that the outcome of his criminal case is binding on the Department of Revenue. Taxpayer asserts the Department of Revenue should be collaterally estopped from denying that Taxpayer did not criminally possess a controlled substance since he was convicted of only attempted possession. By implication. Taxpayer renews his argument that a finding of criminal possession is necessary before the drug tax will attach.

Taxpayers ninth, and final argument must also be rejected. First, Taxpayer's argument regarding double jeopardy relates to the constitutionality of the drug tax. As noted above. Constitutional questions are beyond the scope of these proceedings. As a result. Taxpayer's argument regarding double taxation is rejected.

Second, Taxpayer's argument concerning res judicata and collateral estoppel is without merit.

The matter is not barred by res judicata because the cause of action is not the same.

The rule of collateral estoppel is generally con-

sidered to be an aspect of the broader principal of res judicata. In essence, collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment. that issue cannot again be litigated between the same parties in a future lawsuit. In order for the doctrine of collateral estoppel to apply, both the issues and the parties involved in subsequent litigation must be essentially the same. In In re Estate of Beason, 248 Kan. 803, Syl ¶6.___ P.2d __ (1991). the Court noted that:

> Collateral estoppel prevents a second litigation of the same issues between parties or their privies. Collateral estoppel requires: (1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based upon ultimate facts as disclosed by the pleadings and judgment: (2) the panics must be the same or in privity, and; (3) the issue litigated must have been determined and necessary to support the judgment.

In this case, it does not appear the requirement's of Beason have been met. First, the Journal Entry of Taxpayer's criminal conviction indicates Taxpayer entered a plea of nolo contendere which was probably the result of a plea agreement. As such, the criminal court never ruled on the merits of the case.

Second, the issues involved in this proceeding and the criminal proceeding are not identical. Note for example that:

(a) The prosecution for possession of a controlled substance without a tax stamp contrary to K.S.A. 79-5208 is criminal. The imposition of tax is civil.

(b) The standard of proof in the criminal case is beyond a reasonable doubt; in the tax matter the valid-

ity and correctness of the assessment is presumed. [See K.S.A. 79-1505(c).]

(c) in the criminal prosecution the State has the burden of proof. in the tax matter. the burden is on the Taxpayer to show the incorrectness or invalidity of the tax and penalties assessed. [See K.S.A. 79-1505(c).]

(d) The Department of Revenue has no control over the issues addressed in a criminal case by the State's attorney. The State's attorney has no control over the issues addressed by' the Department of Revenue in regard to matters of taxation.

Third, the parties are neither the same nor in privity. The Kansas Court of Appeals in State v. Parson. 15 Kan. App. 2d 374 (1991) did hold the various agencies of the State of Kansas are in privity with the various county prosecutors such that a prior disposition of a case involving the same issue adverse to an agency would be binding on the prosecutor in a criminal case on the same issue. The Court very carefully noted, however, that the reverse situation is not the case, given the differences in the burden of proof.

HAVING EXAMINED and rejected all of Taxpayer's arguments, all that is left to consider is the motion for summary judgment or a directed verdict raised by the Department of Revenue at the formal hearing.

K.S.A. 79-5201 et seq. creates a rebuttable presumption that the tax and penalties assessed by the Department of Revenue for possession of marijuana or controlled substances to which the proper drug tax stamps have not been affixed are valid and correctly determined and assessed.

K.S.A. 79-5205(c) places the burden of showing the invalidity or incorrectness of the Department's assessment upon the Taxpayer.

The standard by which an attempt to overcome

the presumption found in K.S.A. 79-5205(c) is to be measured is "by a preponderance of the evidence." This standard is well known at law, and has been used as a standard in many contexts and for a considerable period of time. It is, therefore, unnecessary to define or discuss it here.

In this case, Taxpayer did not present any testimony or evidence (other than the document's previously mentioned), choosing instead to base his case on legal arguments. As a consequence, when Taxpayer's legal arguments fail there is no basis for finding Taxpayer has carried his burden of proof. As a result, the Department's Motion for a finding that Taxpayer has failed to overcome the statutory presumption of the correctness and validity of the Department's assessment by a preponderance of the evidence must be granted.

THEREFORE the Designee of the Director of Taxation finds that the Department of Revenue's assessment of July 15, 1988. should be upheld in all respects.

BOTH PARTIES ARE HEREBY ADVISED of the right to petition the Director of Taxation for review of this order, in accordance with K.S.A. 77-526 and 77-527. Such petition for review must be filed with the Director of Taxation within fifteen (15) days after service of this order and shall state the basis for review.

BOTH PARTIES ARE FURTHER ADVISED that, pursuant to K.S.A. 77-530, this Initial Order shall become effective and shall become a Final Order thirty (30) days after service. without further notice, unless reviewed in accordance with K.S.A. 77-527. as amended.

BOTH PARTIES ARE FURTHER ADVISED that a final order of the Director of Taxation may be appealed to the State Board of Tax Appeals, pursuant to K.S.A. 74-2438, by filing notice of appeal with the

secretary of the Board within 30 days of the date of the order and serving a copy of such appeal upon the Director of Taxation.

IT IS SO ORDERED.
Dated at Topeka, Kansas this 15th of September. 1992.

/s/

Jim Weisgerber, Designee of the Director of Taxation Kansas Department of Revenue Docking State Office Building Topeka, Kansas 66625-0001 (913) 296-3044

CERTIFICATE OF SERVICE

In accordance with the provisions of K.S.A. 77-526 and 77-531, as amended, I hereby' certify that a copy' of the above and foregoing Final Order was, on the 15th day of September, 1992, delivered to the principal place of business of:

Alisa M. Dotson
Director of Taxation
Division of Taxation
Kansas Department of Revenue
Docking State Office Building
Topeka, Kansas 66612-1588
(913) 296-3044

Brian Cox
Attorney at Law
Legal Services Bureau
Kansas Department of Revenue
Docking State Office Building
Topeka, Kansas 66612-1588
(913) 296-2381

In accordance with the provisions of K.S.A. 77-531, as amended, I hereby certify that a copy' of the above and foregoing Final Order was, on the 15th day of September . 1992, deposited in the United States Mail, postage prepaid and properly addressed to:

Robert L. Foster. II
1419 Haven Lane
Olathe, KS 66062

Richard W. Parker
Attorney at Law
Executive CentreIII
10901 Lowell, Suite 120
Overland Park. KS 66210

/s/

Jim Weisgerber, Designee of the
Director of Taxation

K.S.A. 79-5205 (C) The tax and penalties assessed by the director of taxation are presumed to be valid and correctly determined and assessed. The burden is upon the taxpayer to show their incorrectness or invalidity. Any statement filed by the director of taxation with the court or any other certificate by the director of taxation of the amount of tax and penalties determined or assessed is admissible in evidence and is prima facie evidence of the facts it contains.

Kansas Supreme Court Rule 9.03 (b) Tax Appeal Cases

The statutory bond shall accompany the notice of appeal and be filed with the clerk of the appellate courts. Unless otherwise requested, the bond shall be in the amount of 125% of the tax assessed and shall be approved by the clerk. If a bond in a lesser amount is requested, the appellant shall submit a motion pursuant to Rule 5.01 with the notice of appeal in lieu of the bond. The appropriate bond shall thereafter be filed within 10 days of the entry of the order granting or denying the motion.